REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2025-003963

(1) REPORTABLE: NO/~~YES~~
(2) OF INTEREST TO OTHER JUDGES: NO/~~YES~~
(3) REVISED: ~~NO~~/YES

[redacted]

SIGNATURE   DATE 2 March 2026

In the matter between:

RUWACON (PTY) LTD Applicant
(Registration number: 2003/017933/07)

and

LEAD ENGINEERING AND PROJECTS (PTY) LTD Respondent
(Registration number: 2012/114701/07)

JUDGMENT

STAIS AJ:

This judgment is handed down electronically by circulating it to the parties' representatives by email and by uploading on CaseLines.

[1] This is an application for a final winding up order in terms of the Companies Act, 1973 ("1973 Act"), as read with Item 9 of Schedule 5 to the Companies Act,

2008 ("Act") on the grounds of the respondent's inability to pay its debts [s 344(f) read with s 345(1)(a) or s 345(1)(c)], alternatively because it is just and equitable to do so [s 344(h)]. The claim is founded on a written acknowledgment of debt. I must also consider whether the applicant's refusal to accept a tender for payment of the debt constitutes an abuse of court processes. Two further matters resolved themselves and I am not called upon to consider the respondent's striking out application or whether to admit its further affidavit; the former was withdrawn and the latter admitted by agreement.

[2] Several affidavits additional to the customary three affidavits were filed in this matter, some by agreement and another by order of court. The applicant's replying affidavit was filed on 6 March 2025, whereafter the applicant agreed to the respondent filing a fourth affidavit to respond to new matter in the replying affidavit involving a cession by the respondent in favour of Absa Bank Ltd ("Absa"). It filed the fourth affidavit on 12 May 2025, which caused the applicant in turn to file a supplementary replying affidavit on 22 May 2025. On 29 August 2025, on the eve of the intended hearing of this application on 1 September 2025, the applicant sought leave to file yet another affidavit, this time dealing with a belated tender that had been made to the applicant, on a without prejudice basis, on 12 August 2025 and repeated on 25 August 2025. The main application was postponed, and the respondent was granted the requested leave by Order dated 4 October 2025 to file the so-called tender affidavit. In terms of the aforesaid Order, the applicant filed a second supplementary replying affidavit on 21 October 2025 in response to the tender affidavit. One would reasonably have expected that to be the close of the pleadings, yet on the eve of the hearing before me the respondent on 23 January 2026 attempted a final bite at the proverbial cherry when it filed an affidavit in excess of 140 pages (with annexures) "*to deal with new matter and adverse conclusions raised*" in the applicant's last affidavit that had been filed some four months earlier. I am mindful that there has been a mid-way intervention by the Court, but it would be remiss of me not to caution that a winding up application should not be litigated through never-ending sets of affidavits filed over a period of more than a year (albeit that they were filed by agreement).

[3] Despite the prolixity of the papers, the material facts are uncomplicated and largely common cause. Such disputes as do exist, can comfortably be decided on the papers.

[4] The respondent was placed under business rescue in terms of Chapter 6 of the Act, but those proceedings were terminated in November 2023 when a notice of substantial implementation was filed. Apparently, the respondent's financial problems were not entirely resolved because within a few months it was unable to settle a R2.3 million debt due to the applicant, causing the parties to conclude a written acknowledgement of debt ('AoD') in August 2024. The relevant terms of the AoD required of the respondent to make timeous instalment payments towards an aggregate debt of R2,3 million [clause 3] with an acceleration clause on failure making the balance immediately due and payable [clause 4], and further, included a non-variation provision that prevented any amendment to the AoD unless by written signed agreement [clause 8]. The instalments of R575,000.00 were due to be paid on or before 31 October 2024, 8 November 2024, 8 December 2024 and 8 January 2025.

[5] The respondent made the first payment of R575 000.00 on 31 October 2024 and then breached the AoD by failing to make the next payment, because its cashflow had been impacted due to a contractual dispute involving a third party. In terms of the AoD, the total outstanding amount became immediately due and payable. On 15 November 2024 the respondent sought a relaxation and extension of the agreed time periods recorded in the AoD and also failed to make the next payment due on 8 December 2024. The applicant's response to the admitted breaches of the AoD was to deliver a demand in terms of s 345(1)(a) of the 1973 Act on 11 December 2024, for the respondent to pay or secure or compound for payment the outstanding amount of R1,725,000.00 plus interest (at a rate of 12% per annum, compounded monthly and capitalised), for the stated reason that an extension of the payment terms was prohibited by clause 8 of the AoD. The respondent failed to pay or secure or compound for payment the outstanding amount, and instead proceeded to pay only R575,000.00 on 7 January 2025. On 10 January 2025 it requested an indulgence to pay the remaining two instalments on 8 February 2025 and

8 March 2025. The applicant rejected this request on 13 January 2025 and issued the present application on 15 January 2025.

[6] On 5 February 2025 the respondent's bank account was attached pursuant to a Court Order, and uplifted on 24 February 2025 in terms of a reconsideration Order obtained by the applicant. There has been no impediment preventing the respondent from making payment to the applicant since this date.

[7] The tender affidavit disclosed that the respondent had made a without prejudice tender to the applicant on 12 August 2025 to pay the full capital plus interest owing at the time, together with the costs of this application up to that date. The tender was repeated on a with prejudice basis on 25 August 2025. The respondent refused to accept the tender. In the affidavit filed late in January 2025, the respondent introduced further evidence in respect of the tender. First, a letter dated 29 September 2025, after the applicant had filed its heads of argument and other processes in anticipation of the hearing of this application, in which the applicant insisted that the proper course for the applicant was to accept the tender, which it was ready, willing and able to perform. Second, a further letter dated 1 December 2025, with enclosed proof of payment of R1,293,627.51 to the applicant, comprising the original tendered amount together with interest accrued on the trust investment account as at date of payment (and reserving the respondent's rights in respect of costs). The applicant had rejected the payment in a letter dated 4 December 2025, which requested the respondent's or its attorneys' bank details so that the payment could be returned. This was not provided and on 10 December 2025 the applicant informed the respondent that the payment, which had not been accepted by the applicant, will be paid into its attorneys' trust account and be paid over to the liquidators.

[8] Counsel were agreed that I could, and should, decide the matter finally. The question is whether the applicant has established its case for a winding up on a balance of probabilities [*Kalil v Decotex (Pty) Ltd* 1988 (1) SA 943 (A)]. There are three issues to consider: (a) whether the respondent is unable to pay its debts, either in terms of s 345(1)(a) or s 345(1)(c); (b) whether it appears to the

court that it is just and equitable that the respondent be would up; and (c) whether the applicant's refusal to accept the tender of payment or payment constitutes an abuse of the court processes. For reasons that shall become apparent, I shall deal with the last issue when dealing with the first and not deal with the second issue at all.

Inability to pay

[9] The heads of argument filed on behalf of the respondent did not engage with this issue at all. I hasten to add that the heads of argument were not prepared by Mr Bester SC, who appeared before me and addressed the matter fully in argument. He submitted that the respondent suffered at the time from a temporary cashflow crunch that had improved to the extent that all its creditors have been paid and it is now neither commercially nor factually insolvent. His suggestion that the founding affidavit was thin on the necessary facts cannot be taken at face value, as the answering affidavit contained little more than an admission of the fact that its then-current inability to make payments were caused by external factors. The matter certainly evolved over time, and particularly after the respondent's attempt to explain its financial position and solvency in the fourth affidavit. I must therefore consider the complete narrative of events.

[10] It is common cause that the respondent was indebted to the applicant in the sum of R1,725 million and that the latter duly served on the respondent a demand in terms of s 345(1)(a) of the 1973 Act. The latter failed to pay the sum or to secure or compound for it to the satisfaction of the applicant. The consequence of this is that the respondent is deemed to be insolvent. That is the starting point.

[11] Save for the issue of the tender and belated payment (to which I shall revert), the respondent did not dispute its indebtedness.

[12] When the respondent did respond to the demand, it was to seek an extension of the payment terms before it attempted to excuse its failure to pay by referring

to the external factors caused by the third-party dispute and attachment of its bank account. The approaches would not fill a creditor with confidence as to the debtor's financial strength, and it did not do so for the applicant. I would venture to suggest that the external factors faced by the respondent are some of the very reasons that frequently motivate creditors to launch winding up applications. As a matter of law, the required performance (*i.e.*, payment of the debt) was not of a personal nature and it was not rendered impossible by the alleged intervening external factors [*Scoin Trading v Bernstein* 2011 (2) SA 118 (SCA) at para 22]. It follows that the applicant is entitled to a winding up *ex debito justitiae* and the court's discretion to refuse an order is a very narrow one, rarely exercised and only if special or unusual circumstances prevail. [*Afgri Operations Ltd v Hamba Fleet Management (Pty) Ltd* 2022 (1) SA 91 (SCA) para 12].

[13] The respondent contends that it is neither nor factually commercially insolvent. It says so despite that fact that it failed to pay the applicant until almost a year after this application had been filed. It also failed to pay R186,000.00 to SA Container Park (Pty) Ltd ("SA Container Park"), a trade creditor that launched an application for the winding up of the respondent in mid-2024. This application remains pending despite the respondent having initially tendered the payment of its claim in full and paying the money to its attorneys in trust for the sole benefit of SA Container Park, and (as with the applicant) finally paying SA Container Park directly on 1 December 2025. This was confirmed by affidavit and proof of payment filed by agreement *in medias res*. The respondent has provided no correspondence between it and SA Container Park that would explain whether it unconditionally accepted the payment, or whether it has elected not to do so and has kept its winding up application alive for the same reason the applicant did. One would reasonably have expected the respondent to ensure that SA Container Park withdrew its application before the hearing of this matter. Whilst I am reluctant to read too much into these facts and expectations, and whatever the undisclosed explanation may be, I agree with Mr Van Tonder (who appeared for the applicant) that I cannot ignore the fact that there is another winding up application pending against the respondent.

[14] Despite being called upon to disclose its annual financial statements for the years ending December 2023 and December 2024 to dispute what the applicant referred to as "*its hopeless financial state*", the respondent chose not to do so. Its stated reason was that it had no obligation "*to produce evidence in rebuttal of an unsubstantiated allegation.*" This is a baffling response in light of the admitted facts at the time. Significantly, the respondent did not say that it did not have those financial statements (which it was obligated to furnish to Absa) but rather that it was not necessary to disclose them to the applicant. The obvious corollary of its refusal is the fact that I am also unable to consider the financials. And despite the development of the matter over time and the further relevant questions that were raised regarding its solvency, it did not revisit its election:

"*Now, when a man commits an act of insolvency he must expect his estate to be sequestrated. The matter is not sprung upon him . . . . Of course; the Court has a large discretion in regard to making the rule absolute; and in exercising that discretion the condition of a man's assets and his general financial position will be important elements to be considered. Speaking for myself, I always look with great suspicion upon, and examine very narrowly, the position of a debtor who says, 'I am sorry that I cannot pay my creditor, but my assets far exceed my liabilities.' To my mind the best' proof of solvency is that a man should pay his debts; and therefore I always examine in a critical spirit the case of a man who does not pay what he owes*".

[*De Waardt v Andrew and Thienhaus* 1907 TS 727]

[15] What it did decide to provide, was its July 2025 balance sheet. I heard argument from counsel on the accounting and auditing inferences to be drawn from this document, which was ultimately the only materially relevant document put up by the respondent to demonstrate its solvency. That it left much to be desired, was revealed by counsels' attempts to extract information that suited their client's respective cases. I do not criticise counsel, but if I am to cut the Gordion knot (as I must), I prefer the submissions by Mr Van Tonder that the balance sheet confirms that the respondent is factually and commercially insolvent. As he pointed out, the document records that the total liabilities exceed the total assets by R326,324,604.29, and the cash and cash equivalents of

approximately R1½ million are insufficient to satisfy the current liabilities in excess of R40 million. It would, in my view, be wrong when determining factual solvency, to exclude subordinated claims (as Mr Bester suggested); the holders of those claims are prospective creditors who are entitled to be paid after the claims of all other creditors are settled. Not all creditors were paid. There are certainly other creditors that were not paid during 2025, some of which may have claims that are due and payable. SA Container Park was one such creditor. As the respondent explained, SA Container Park debt fell under the line item of 'trade creditors' of approximately R30 million. It would not be correct to include 'trade and trade receivables' for the purpose of determining commercial solvency. These are not liquid or ready realisable assets that can be used to pay debts as and when they fall due. [*Rosenbach & Co (Pty) Ltd v Singh's Bazaars (Pty) Ltd* 1962 (4) SA 593 (D&CLD) at 597C-E/F] The balance sheet does not displace the prima facie inference of insolvency, but rather confirms it.

[16] Finally, it appears to be indisputable that the respondent may have paid as much as R25 million to Absa and R61 million to Merchant Commercial Finance (Pty) Ltd ("Merchant Finance") since this application was issued. The Absa debt of approximately R26 million decreased to only R1 363 464.63 as at July 2025, and its debt of approximately R61 million to Merchant Finance was discharged during August 2025. I cannot in the circumstances simply assume that the applicant traded itself out of these debts and did not incur further loan funding to do so. The respondent did not make a full disclosure of the facts as to when, how much and how it managed to pay these debts in circumstances where it was unable to pay the relatively small claims of the applicant and SA Container Park. It does not follow from the fact that major creditors were paid, that the respondent is solvent. The respondent's situation was well described in the following *dicta* in *Rosenbach supra* at 598B/C-D/E:

"*The prima facie inference, therefore, is that the respondent was unable to pay these debts. Had it been able to do so, but actuated by the motives spoken of by Singh, it would have paid them in the interval of time between the 26th June and 8th July, for I do not believe that a business man would permit irritation and pique so to influence his* *business relations as to deter him for so long from settling such debts if he was able to do so.*"

[17] I am accordingly satisfied that the respondent is unable to pay its debts.

[18] Which brings me to the issue of the tenders that were rejected by the applicant, and the payment that it refuses to accept.

[19] The applicant's reason for doing so, is explained in correspondence between the parties' attorneys and in its affidavits. Since it established in mid-2025 that the respondent had made substantial payments to Absa and Merchant Finance, and that there was another winding up application pending due to the failure to pay SA Container Park, it was concerned that acceptance of the tenders or payment could be impeached as a void or voidable disposition. The respondent contends that the concerns are unfounded and that the applicant's conduct constitutes an abuse of court processes. There is, however, support for the applicant's attitude.

[20] A tender is an undertaking to pay. It does not constitute payment [*Origo International (Pty) Ltd v Smeg South Africa (Pty) Ltd* 2019 (1) SA 267 (GJ) para 16] and the applicant was not obligated to accept the tenders or the payment. The *locus classicus* on the issue is *Salkow v Reeb: Winter Intervening* 1930 WLD 166:

"*The next point to be considered is whether the tender of payment to Winter of the amount due under the promissory note is an answer to the claim for sequestration. I am prepared to assume in favour of the respondent that this is an unconditional tender, but it seems to me that the creditor is not necessarily compelled to accept payment of a debt, where payment is offered to him at a time when he knows that the debtor is in insolvent circumstances, and that the payment to him in full will constitute a preference.*" [at 174]

[See also *Ozinsky NO v Lloyd* 1992 (3) SA 396 (C) at 424D (judgment confirmed on appeal in *Ozinsky NO v Lloyd* 1995 (2) SA 915 (AD)); *Harvey NO v Theron*

& Anor 2023 JDR 2302 (WCC) paras 47 and 48; *Mars The Law of Insolvency in South Africa* 9th Ed pp248, 261, 373]

[21] The facts indicate that the respondent was at all relevant times insolvent and that the consequences of the tender and payment would be to prefer one creditor above others. It suffices to refer to the fact that the tenders and payment were made when the respondent had an outstanding debt to SA Container Park and there was (and remains) a pending winding up application that hangs as the sword of Damocles over these proceedings. Mr Van Tonder correctly pointed out that once the liquidator has proved the elements of a void or voidable transaction, there is no defence available to the applicant in whose favour the payment was made.

[22] The respondent's contention that the payment to the applicant was made in the ordinary course of business cannot be accepted at face value. The same applies to the tender and payment to SA Container Park. The *onus* will ultimately be on the applicant (in whose favour the disposition was made) to prove that the tenders and payment were made in the ordinary course of business and that it was not intended thereby to prefer the applicant above other creditors. But the tenders and payment were made at times when the respondent (and applicant) knew that insolvency was actual or imminent and that the disposition would have preferred the applicant above other creditors (*i.e.*, SA Container Park and Absa). I cannot readily accept that the tenders or the payment was made in the normal course of business. They were not made in terms of a valid contract, such as the AoD that was executed in a manner and on the prescribed date for payment but were made under duress and despite the threat of winding up proceedings that had been launched by two creditors. [See *Mars supra* at para13.19]

[23] The applicant was correct in refusing to accept the tenders and payment made by the respondent.

[24] Having found that the respondent is unable to pay its debts, it is not necessary that I consider the alternative relief for a just and equitable winding up under s 344(h) of the 1973 Act.

[25] I grant the following order:

1. The respondent is placed in final winding up.

2. The costs of the application shall be costs in the winding up.

[redacted]

P STAIS
Acting Judge of the High Court
Johannesburg

APPEARANCES:

Applicant:	Mr LvR van Tonder
Instructed by:	SmitSew Attorneys
Respondent:	Mr A Bester
Instructed by:	WJJ Badenhorst Inc
Hearing:	11 February 2026
Judgment:	2 March 2026